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DESA SAMUDRA SDN BHD v. BANDAR TEKNIK SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
AZIZAH NAWAWI JCA
B CHE MOHD RUZIMA GHAZALI JCA
[CIVIL APPEAL NO: W-04(C)(W)-415-07-2019]
10 MARCH 2021

C ***CIVIL PROCEDURE:*** *Interest – Post-judgment interest – Power of court to direct interest to be paid – Whether to be exercised in accordance with rules of court – Whether s. 25 of Courts of Judicature Act 1964 vests rights to post-judgment interest – Whether only empowers court to direct interest on judgment debt – Whether court rules give rise to substantive right in law – Whether stakeholder and consent agreements give rise to right to post-judgment interest – Whether agreements merely*
D *preserved respective position of parties – Rules of Court 2012, O. 42 r. 12 – Rules of the Court of Appeal 1994, r. 15*

The appellant filed a suit in the High Court against the respondents in 1998 ('1998 Suit') wherein, the appellant's claim and the respondents' counterclaim were dismissed. On appeal, the Court of Appeal dismissed the
E appellant's appeal and allowed the respondents' cross-appeal ('COA 2010 judgment'), *inter alia*, that the judgment sum carry interest at the rate of 8% from the date of filing of the counter-claim (22 September 1998) for a term of six years. However, when drafting the order of the Court of Appeal, the respondents' solicitors had instead provided for '... faedah 8 peratus setahun
F dari tarikh menfailkan tuntutan balas (22 September 1998) (tunggakan terhad kepada enam tahun (2 September 2004 – 2 September 2010)) hingga tarikh selesaian'. The appellant's solicitors objected to this as the appellant took the position that the respondents were taking the stand that, in addition to the accrued interest capped at a period of six years, the appellant was to make
G a further interest payment of 8% until the date of full and final payment of the judgment debt. The appellant then amended the draft Order to read '... faedah 8 peratus setahun dari tarikh menfailkan tuntutan balas (22 September 1998) untuk 6 tahun sahaja …'. The amended draft order was then returned to the respondents. The respondents disagreed with the appellant's
H interpretation of the COA 2010 judgment and sought clarification from the Court of Appeal. Consequent to the clarification, the final order of the COA 2010 judgment was amended, approved and sealed by the court that 'faedah 8 peratus setahun dari tarikh menfailkan tuntutan balas (22 September 1998) untuk 6 tahun sahaja'. In the meantime, following the COA 2010 judgment,
I the plaintiff obtained stay of execution of the COA Order pending the disposal of the plaintiff's application for leave to appeal to the Federal Court on condition that the judgment debt be held in a joint solicitors stakeholders'

account pending the hearing and final disposal of the plaintiff's leave application ('stakeholder agreement'). The parties also agreed that the said agreement reached was 'without prejudice to the rights of both parties on the issue of post-judgment interest'. Following the stakeholder agreement, the parties entered a consent order dated 11 October 2010 which captured the terms set out in the stakeholder agreement ('consent agreement'). A B

On 16 May 2016, the respondents filed this suit, at the Sessions Court, to claim for post-judgment interest of the 1998 Suit from the date of filing premised on three distinct causes of action: (i) of the Rules of High Court 1980 ('RHC'); (ii) stakeholder agreement dated 29 September 2010; and (iii) common law (unjust enrichment). The appellant filed its amended defence and counterclaim, as well as an application to strike out the underlying suit on the grounds of *res judicata* and abuse of process. The SCJ allowed the respondents' claim for the post-judgment interest and dismissed the appellant's counterclaim. On appeal, the Judicial Commissioner ('JC') looked at the statutory provisions of O. 42 r. 12 of the RHC, r. 15 of the Rules of the Court of Appeal 1994 ('COA Rules'), s. 11 of the Civil Law Act 1956 ('CLA') and s. 16(i) of the Courts of Judicature Act 1964 ('CJA') and came to the conclusion that the respondents had a statutory cause of action to claim for post-judgment interest of the 1998 Suit. Hence, this appeal by the appellant against the order allowing post-judgment interest. C D E

Held (allowing appeal with costs)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) The respondents' pleaded case was limited to O. 42 r. 12 of the RHC and r. 15 of the COA Rules. Section 25(2) of the CJA, read with item 7 of the Schedule, means that the court have the power to direct interest to be paid, and such powers shall be exercised in accordance with the rules of court, namely under O. 42 r. 12 of the RHC or O. 42 r. 12 of the Rules of Court 2012 ('ROC') or r. 15 of the COA Rules. Therefore, whilst s. 25(2) of the CJA, read with item 7 of the Schedule, empowers the court to direct interest on a judgment debt, the procedure to grant interest is provided in the rules. Hence, the JC fell into error in relying on the CJA and the CLA. (paras 34, 39 & 40) F G

(2) Section 25(2) of the CJA, read with item 7 of the Schedule, do not vest onto the respondents the statutory rights to post-judgment interest. Section 25(2) of the CJA, read with item 7 of the Schedule, merely empowered the court to direct interest to be paid on a judgment debt. This, the court had done in the 2010 COA judgment. The rules of court, including the RHC and the COA Rules, are merely subsidiary legislation for the regulating of court procedures. The rules of court do not give rise to a substantive right in law. Therefore, O. 42 r. 12 of the RHC and r. 16 of the COA Rules do not grant substantive rights to the respondents H I

to enable this action to be brought. In the premise, both the SCJ and the JC fell into error when they made a finding that the respondents had a cause of action to claim for the post-judgment interest premised on the procedural law, O. 42 r. 12 of the RHC and/or r. 16 of the COA Rules. To allow the same is akin to allow the filing of any claim whatsoever under the inherent powers of the court pursuant to O. 92 r. 4 of the RHC/ROC. Therefore, the respondents failed to establish a valid cause of action under O. 42 r. 12 of the RHC and/or r. 16 of the COA Rules Order. (paras 44-46 & 57)

(3) The respondents' cause of action was also premised on the stakeholder agreement entered into on 29 September 2010, which was subsequently encapsulated into a consent agreement, and this formed a separate cause of action, independent of the original judgment. Both the stakeholder and consent agreements merely preserved the parties' respective positions, *vis-a-vis* their differences on the issue of post-judgment interest. There was nothing in either agreement that provided for the respondents the right to post-judgment interest or that the appellant had agreed that the respondents were entitled to post-judgment interest. As such, there was no contractual basis for the respondents to claim for the post-judgment interest. (paras 47 & 56)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Bungsar Hill Holdings Sdn Bhd v. Damansara Realty Bhd [2019] 4 CLJ 429 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Government of the Federation of Malaya v. Surinder Singh Kanda [1961] 1 MLJ 1 ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11
Courts of Judicature Act 1964, ss. 16(i), 25(2), Schedule item 7
Rules of Court 2012, O. 92 r. 4
Rules of the Court of Appeal 1994, rr. 15, 16
Rules of High Court 1980, O. 42 r. 12, O. 92 r. 4
Rules of the Federal Court 1995, r. 137

For the appellant - Malik lmtiaz, Yvonne Lim & Roobini S; M/s Weng & Co
For the respondents - CP Mahendran & G Suritha; M/s RR Chelliah Brothers

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Appeal No: WA-12BC-8-09-2018 (overruled).]

Reported by S Barathi

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner ("JC") dated 12 July 2019, where the learned JC had dismissed the appellant's appeal against the decision of the Sessions Court Judge ("SCJ") dated 5 September 2018.

[2] The SCJ had allowed the respondents' claim for post-judgment interest in the sum of RM326,053.63 with interest at 5% per annum from the date of judgment until full settlement and had dismissed the appellant's counterclaim for excess payment of interest of RM154,815.01.

[3] On appeal, the learned JC had dismissed the appellant's appeal. In the appeal before us, the appellant had elected to proceed against the order allowing the suit for post-judgment interest in the sum of RM326,053.63, and had abandoned its appeal on the counterclaim.

[4] Having considered the appeal record and the submissions of all parties, this court has allowed the appellant's appeal with costs. Our decision was unanimous and these are our grounds for allowing the appeal.

The Background Facts

1998 Suit

[5] The appellant had filed a suit in the High Court in 1998 against the respondents in relation to the construction of a 14-storey building in Kuala Lumpur ("1998 suit"). The respondents, the contractor and sub-contractors respectively, filed a counterclaim.

[6] After a full trial, the High Court had dismissed both the appellant's claim and the respondents' counterclaim. Both parties have appealed against the said decision.

[7] On 2 September 2010, the Court of Appeal had dismissed the appellant's appeal and allowed the respondents cross-appeal ("COA 2010 judgment") on the following terms:

(i) that the appellant was to pay the sum of RM3,290,000 to the defendants;

(ii) that the judgment sum carries interest at the rate of 8% from the date of filing of the counterclaim (22 September 1998) for a term of six years.

[8] However, when drafting the order of the Court of Appeal, the respondents' solicitors had instead provided for "... faedah 8 peratus setahun dari tarikh memfailkan tuntutan balas (22 September 1998) (tunggakan terhad kepada enam tahun (2 September 2004 - 2 September 2010)) hingga tarikh selesaian".

[9] The appellant's solicitors objected to this by their letter dated 20 September 2010 as the appellant took the position that the respondents were taking the stand that in addition to the accrued interest capped at a period of six years, the appellant was to make a further interest payment of 8% until the date of full and final payment of the judgment debt. The appellant then amended the draft order to *inter alia*, remove the term reproduced above and the amended draft order read "... faedah 8 peratus setahun dari tarikh memfailkan tuntutan balas (22 September 1998) untuk 6 tahun sahaja ...". The amended draft order was then returned to the respondents.

[10] The respondents disagreed with the appellant's interpretation of the COA 2010 judgment and sought clarification from the Court of Appeal. On 5 October 2010, the respondents had written to the Court of Appeal expressing their disagreement with the appellant's interpretation of interest payable and sought an appointment with the learned Deputy Registrar of the Court of Appeal ("DR") to clarify the same.

[11] The chronology of events pertaining to the clarification of the COA 2010 judgment is as follows:

(i) The Court of Appeal fixed an appointment on 22 November 2010 for parties to appear before the DR regarding the draft COA order, but the appointment had been rescheduled.

(ii) *Vide* a letter dated 23 February 2011, the defendants had written to the Court of Appeal seeking an appointment with Justice Dato' Jeffrey Tan to "clarify the issue of "prejudgment" and "post judgement" interest".

(iii) On 26 November 2011, the parties ultimately appeared before the DR, Tuan Edwin Paramjothy. At this meeting, Tuan Edwin informed counsel for both parties that he needed time to seek the guidance of Justice Jeffrey Tan who had delivered the COA judgment.

(iv) On 21 January 2012, Tuan Edwin informed counsel for parties that he was unable to meet Justice Jeffrey Tan as His Lordship was indisposed, and subsequently fixed a further appointment to update parties on the issue 23 March 2012.

(v) On 23 March 2012, Tuan Edwin informed counsels for parties that he had consulted Justice Jeffrey Tan who agreed with the appellant's position that the Court of Appeal had fixed interest on damages awarded to six years from the date of filing of the respondents' counterclaim.

(vi) Being dissatisfied with the confirmation given by Tuan Edwin on 23 March 2012, the respondents filed a notice of motion ("motion") in the Court of Appeal on 27 March 2012 seeking to clarify the COA order *vis-a-vis* the award of post-judgment interest.

(vii) The motion for clarification was heard on 10 December 2013 before the same panel that delivered the COA 2010 judgment. After hearing arguments from counsel for both parties, the Court of Appeal unanimously dismissed the motion for clarification and confirmed that the COA order as it stood, namely that the period during which interest is recoverable by the respondents shall be limited to six years only. The Court of Appeal had also held that it was *functus officio*.

(viii) Dissatisfied with the Court of Appeal's dismissal of the motion for clarification, the respondents sought leave to appeal to the Federal Court on 7 January 2014 on several questions of law. Ultimately, leave was granted on 26 August 2014 only on one question of law which reads:

> Has the Court of Appeal the jurisdiction to make a fundamental variation of a radical nature of its own judgment on the substantive and statutory right of a successful party to post-judgment interest under Order 42 Rule 12 of the Rules of the High Court 2012 [*sic*] by adding to the judgment an order denying the successful party of such interest, although the amendment does not concern the slip rule or that of its inherent jurisdiction to vary an order so as to carry out its own meaning on mere clarification?

(ix) The appeal was heard by the Federal Court on 18 March 2015 and was dismissed.

(x) Still aggrieved, on 13 April 2015, the respondents then sought a review of the decision of the Federal Court pursuant to r. 137 of the Rules of the Federal Court 1995 ("review"). This was ultimately heard and dismissed on 22 February 2016.

(xi) The final order of the 2010 COA judgment that was amended, approved and sealed by the court provided in prayer (c) that "faedah 8 peratus setahun dari tarikh memfailkan tuntutan balas (22 September 1998) untuk 6 tahun sahaja".

[12] In the meantime, subsequent to the COA 2010 judgment, the plaintiff sought leave to appeal to the Federal Court and to stay the execution of the COA order pending the disposal of the plaintiff's leave application. The stay application was fixed for hearing on 11 October 2010.

[13] However, on 29 September 2010, parties have agreed to stay the execution of the COA order on condition that the judgment debt be held in a joint solicitors stakeholders' account pending the hearing and final disposal of the plaintiff's leave application on the following terms ("stakeholder agreement"):

(i) if the leave is dismissed, the judgment debt shall be released to the defendants' solicitors within seven days:

(ii) if the leave application is allowed, the judgment debt shall be held on the same terms pending the hearing and final disposal of the appeal;

(iii) in the event that the plaintiff's appeal is dismissed by the Federal Court, the judgment debt shall be released to the respondents' solicitors within seven days; and

(iv) in the event that the appellant's appeal proper is allowed by the Federal Court, the judgment debt together with the interest accrued thereon shall be released to the appellant or its solicitors within seven days of the order.

[14] Further, the parties also agreed that the said agreement reached was "without prejudice to the rights of both parties on the issue of post-judgment interest.

[15] Following the stakeholder agreement, the parties then entered into a consent order dated 11 October 2010 which captured the terms set out in the stakeholder agreement ("consent agreement") on the following terms:

(i) the interest accruing on the judgment debt during this period shall be per the rates offered by the bank on the fixed deposit account; and

(ii) the parties have reserved their respective positions *vis-a-vis* their differences on the issue of post-judgment interest.

[16] Following the decision of the Federal Court, the judgment debt plus the interest accrued amounting to RM154,815.01 was then released to the respondent.

2013 Originating Summons

[17] Whilst the motion for clarification was pending before the Court of Appeal, the respondents filed an originating summons in the High Court on 26 February 2013 to recover post-judgment interest on the judgment sum ("2013 OS"). The sum claimed was for RM326,053.63.

[18] The appellant filed an application to strike out the 2013 OS on the ground that it was an abuse of process for multiplicity of actions, in light of the motion for clarification. On 3 June 2013, the 2013 OS was struck out. The respondents did not appeal against the striking out of the 2013 OS.

Present Suit

[19] On 16 May 2016, the respondents filed this suit to claim for post judgment interest of the 1998 Suit from date of filing, 22 September 1998 to 21 December 2011 in the sum RM326,053.63 (RM480,868.64 less sum paid of RM154,815.01) in the Sessions Court. This suit for post-judgment interest was premised on three distinct causes of action:

(i) under O. 42 r. 12 Rules of the High Court 1980 ("RHC 1980");

(ii) stakeholder agreement dated 29 September 2010; and

(iii) under common law (unjust enrichment).

[20] On 15 July 2016, the appellant filed its amended defence and counter-claim, as well as its application to strike out the underlying suit on the grounds of *res judicata* and abuse of process. The application was allowed by the Senior Assistant Registrar, but was reversed on appeal by the learned High Court Judge. After a trial, the respondents' claim for the post-judgment interest was allowed by the SCJ.

Findings Of The Sessions Court Judge

[21] The SCJ's findings can be summarised as follows:

(i) the respondents' claim for recovery of post-judgment interest was not barred by *res judicata*;

(ii) there was no evidence to show that the parties had agreed to cap both pre-and post-judgment interest applicable on the principal sum under the COA judgment;

(iii) the consent order clearly allowed the respondents to claim for post-judgment interest by reference to minute (1)(iii);

(iv) the respondents were entitled to claim for post-judgment interest pursuant to O. 42 r. 12, RHC 1980 and r. 15, Rules of the Court of Appeal 1994; and

(v) the SCJ did not make any finding on the claim for unjust enrichment.

Findings Of The High Court

[22] The appellant had appealed against the decision of the SCJ. The appellant's appeal was dismissed by the learned JC. In para. [58] of the GOJ, the learned JC restated the grounds of the respondents' claim for post-judgment interests, namely:

(i) under O. 42 r. 12 RHC 1980 and r. 15 COA Rules;

(ii) under contract; and

(iii) unjust enrichment.

[23] With regards to statutory breach under O. 42 r. 12 RHC 1980 and r. 15 COA Rules, and the learned JC, *inter alia*, concluded as follows:

> [65] ... it is trite that a successful plaintiff is entitlement to post-judgment interest under O. 42 r. 12 RHC 1980 in respect of monetary awards if payment is not made immediately since such plaintiff would be kept out of this money by the defendant, and the plaintiff is able to recover the same by way of a fresh action ...

[24] With regards to the claim premised on contract, the learned JC's findings are as follows:

> [61] I have scrutinised the NoE and documentary evidence in the RoA and in my view, it cannot be said that the SCJ's reliance on the Consent Stay Order is entirely misplaced when the ordinary meaning of the phrase "tanpa memudaratkan hak-hak mana-mana pihak di sini mengenai isu faedah selepas penghakiman", which appears twice in the Consent Stay Order (as quote in full in paragraph 22 of this judgment) and applies equally to either party, lends support to the respondents' argument that the consideration for the stay of execution was the right to post-judgment interest in the event that the appeal to the Federal Court was dismissed. That eventuality ultimately became a reality and thus, upon the Federal Court's decision on 18.3.2015, the respondents' entitlement to post-judgment interest as evinced in the Consent Stay Order arose.
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> ...
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> [69] In the upshot, the respondents at the trial, had convinced the SCJ of their intention in entering into the Consent Stay Order whereby they had never relinquished or waived, or agreed to forego, their right to post-judgment interest at any point of time. It is my considered view that the SCJ's findings as per paragraphs 18 and 19 of her GOJ is unassailable on any of the appellant's grounds of challenges as stated in its Memorandum of Appeal

[25] The learned JC did not make any finding on the issue of unjust enrichment.

Our Decision

[26] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 the Court of Appeal held as follows:

> .... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence**.
>
> (emphasis added)

[27] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[28] Bearing in mind the above principles, we will now deal with the appeal of the appellant.

[29] As alluded to above, the respondents' claim for post-judgment interest in respect of the 1998 suit is premised on O. 42 RHC 1980, the stakeholder agreement dated 29 September 2010 and under common law. We also take note that the respondents' claim premised on unjust enrichment was not allowed by both the SCJ and the learned JC. Therefore, the issues are limited to a claim premised on O. 42 RHC 1980 and the stakeholder agreement dated 29 September 2010.

[30] Before we deal with the respective causes of action relied on by the respondents, we refer to the case of *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, where Salleh Abas LP made reference to the meaning of the words "a cause of action", and His Lordship said this:

> What then is the meaning of 'a cause of action'? 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action.

[31] In the present case, it is incumbent on the respondents to establish that their rights, either under statute, contract or common law, have been prejudiced by the appellant. Thus, the respondents must establish in the Sessions Court that they have a cause of action, *vide* their pleaded case, either under O. 42 r. 12 RHC 1980, under the stakeholder agreement or under common law.

Order 42 Rule 12 RHC 1980

[32] The respondents took the position that s. 25(2) of the Courts of Judicature Act 1964 ("CJA") read together with item 7 of the Schedule to the CJA gives O. 42 r. 12 RHC 1980 statutory force creating a cause of action upon its breach/infringement.

[33] The learned JC however, in considering the legal question of cause of action that had been raised in the appeal, looked at the statutory provisions of O. 42 r. 12 RHC 1980, r. 15 Rules of Court of Appeal, s. 11 of the Civil Law Act 1956 and s. 16(i) of the CJA and came to the conclusion that the respondents had a statutory cause of action to claim for post-judgment interest of the 1998 suit.

[34] In the first place, the learned JC fell into error when she relied on the CJA and the Civil Law Act to make her finding, as the pleaded case of the respondents was limited to O. 42 r. 12 of the RHC 1980 and r. 15 of the COA Rules.

[35] Order 42 r. 12 ROC 2012 reads as follows:

> 12. Interest on judgment debts (O. 42 r. 12)
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> Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.

[36] Rule 15 of the COA Rules reads:

> 15. Interest
>
> On any appeal, interest, for such time as execution had been delayed by the appeal, shall be allowed, unless the Court otherwise orders, and the Registrar may compute such interest without any order for that purpose

[37] Section 25(2) of the CJA reads:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same

[38] Item 7 of the Schedule reads:

> 7. Interest
>
> Power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court.

[39] Essentially, s. 25(2) of the CJA read with item 7 of the Schedule simply means that the court has the power to direct interest to be paid, and such powers shall be exercised in accordance with the rules of court, namely under O. 42 r. 12 RHC 1980 or O. 42 r. 12 Rules of Court 2012 ("ROC 2012") or r. 15 of the COA Rules.

[40] Therefore, whilst s. 25(2) of the CJA read with item 7 of the Schedule empowers the court to direct interest on a judgment debt, the procedure to grant interest is provided in the rules. This is the position taken by the Federal Court in the case of *Bungsar Hill Holdings Sdn Bhd v. Damansara Realty Bhd* [2019] 4 CLJ 429, where the court held that:

> item 7 of the Schedule to the Courts of Judicature Act 1964 read with s. 25(2) of the Act granted additional power to make an order of interest to be exercised in accordance with any written law or rules of court

[41] In the present case, the COA had exercised its powers pursuant to s. 25(2) of the CJA read with item 7 of the Schedule to direct interest of 8% be paid on the judgment debt in the 2010 COA judgment.

[42] However, the respondents took the position that the 8% interest in the 2010 COA judgment is pre-judgment interest, not post-judgment interest. Hence the respondent filed this suit for post-judgment interest grounded on O. 42 r. 12 RHC 1980 and r. 15 COA Rules.

[43] In their written submission, the respondents had extended their claim on statutory right to interest premised on s. 25(2) of the CJA read with item 7 of the Schedule.

[44] We are of the considered opinion that s. 25(2) of the CJA read with item 7 of the Schedule do not vest onto the respondents the statutory rights to post-judgment interest. Section 25(2) of the CJA read with item 7 of the Schedule merely empowered the court to direct interest to be paid on a judgment debt. This, the court had done in the 2010 COA judgment.

[45] With regards to the respondents' reliance O. 42 r. 12 RHC 1980 as a statutory right to post-judgment interest, we are of the considered opinion and we agree with the appellant that the rules of court, including RHC 1980 and COA Rules, are merely subsidiary legislation for the regulating of court procedures. The rules of court do not give rise to a substantive right in law. This was recognised by the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, where Edgar Joseph Jr FCJ said:

> By s. 17(1) of the Courts of Judicature Act, powers are conferred upon the Rules Committee to make "Rules of Court" for the purpose of regulating and prescribing the practice and procedure to be followed in the respective Courts for which each of them is constituted but within the strict limits defined by s. 17(2).
>
> The most decisive limitation placed on the powers of the Rule Committee, and indeed on other rule-making authorities, is that they extend to regulating the "practice and procedure" of the High Court and other Courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of substantive law. Clearly, *there is a vital distinction made between on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by Courts of law or any other tribunal seized with jurisdiction to adjudicate on a dispute before it*.
>
> I am fortified in the view I take regarding the legal status of the Rules of the High Court by the following passages in *Halsbury's Laws* (4th edn.) Vol. 17. para 10:
>
> > The Rules of the Supreme Court are, a form of delegated or subordinate legislation, and the Supreme Court Rule Committee is empowered to make rules only within the strict limits defined by

> statute, whether contained in the Supreme Court Act 1981 or any other Act The overriding limitation on the powers of the rule committee to make rules is that they must be confined to regulating and prescribing the practice and procedure to be followed in the Supreme Court, and they must not therefore extend into the area of substantive law. There is thus at the outset a vital and essential distinction between substantive law, and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Everyone is entitled to enjoy such legal rights or status but equally is liable to perform or comply with his legal duties.
>
> *The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a Court of law or other recognised or properly constituted tribunal …*
>
> And, touching on the function of the Rules of the Supreme Court, *Halsbury* says:
>
> > their function is to regulate the machinery of litigation; they cannot confer or take away or diminish any existing jurisdiction or any existing rights or duties.
>
> *Since they are procedural in character and effect they cannot enable an action to be brought which could not otherwise have been brought*.
>
> (emphasis added)

[46] Therefore, since O. 42 r. 12 RHC 1980 and r. 16 of the COA Rules are rules of procedure, these provisions do not grant substantive rights to the respondents to enable this action to be brought. In the premise, we find that both the SCJ and the learned JC fell into error when they made a finding that the respondents have a cause of action to claim for the post-judgment interest premised on the procedural law, O. 42 r. 12 RHC 1980 and/or r. 16 of the COA Rules. To allow the same is akin to allow the filing of any claim whatsoever under the inherent powers of the court pursuant to O. 92 r. 4 RHC 1980/ROC 2012.

Stakeholder Agreement Dated 29 September 2010

[47] The respondents' cause of action is also premised on the stakeholders agreement entered into on 29 September 2010, which was subsequently encapsulated into a consent agreement, and this formed a separate cause of action independent of the original judgment.

[48] In interpreting the consent agreement, reference is made to the Federal Court decision in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177. In delivering the judgment of the court, Zainun Ali FCJ said:

[34] Where the natural meaning of the contract is not clear and in the particular absence of words to the effect mentioned above, the principles in ICS in their qualified form (see [28] which qualifies its application *vis-a-vis* rectification), remain applicable and relevant to the construction of the construct such as to enable the court to objectively determine "the meaning which the contract would convey to a reasonable person having all the background knowledge ... available to the parties.

[35] The principles of Lord Hoffmann were summarised in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 at p. 296 CLJ; [42] 620G (MLJ). Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

> *Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.*

[36] *This objective approach to interpretation is the "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract*." (K. Lewison, *The Interpretation of Contracts* (5th edn, 2011), Sweet and Maxwell, at 1.03). (emphasis added)

[49] The Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 had also underscored the importance of reading the language against the background of the surrounding circumstances at the material time, as opposed to merely resolving the issue by asking parties what they meant:

[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v. Munawar AH* [2001] 2 WLR 735:

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. *The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the*

A *court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality, it is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in*
B *the context of the circumstances in which they made the agreement The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.* (emphasis added)

[50] In the Sessions Court, the SCJ made a finding that the parties have
C agreed that the respondents are entitled to the post-judgment interest. This can be seen from para. 15 of the grounds of judgment ("GOJ"):

> This court also finds that the consent order dated 29 September 2010 for the stay of execution clearly spelt out the Plaintiffs are entitled to post judgment interest. The part of the consent order dated 29 September 2010
D provides as follows:
>
> (v) dan bahawa persetujuan yang dicapai di atas ini adalah tanpa memudaratkan hak-hak mana-mana pihak disini mengenai isu faedah selepas penghakiman (2 September 2010).

[51] The learned JC agreed with the findings of the SCJ. Even though the
E respondents' pleaded case is premised on the stakeholder agreement, both the SCJ and the learned JC made their findings based on the consent agreement dated 11 October 2010. In any event, the same clause can be found in both the stakeholder agreement and the consent agreement/order.

F **[52]** However, we are of the considered opinion that there is nothing in clause (v) of the consent agreement dated 29 September 2010 that clearly spelt out that the respondents are entitled to post-judgment interest. Clause (v) simply means that the stakeholder agreement or consent agreement was made without prejudice to the rights of both parties on the issue of post-
G judgment interest. In *Government of the Federation of Malaya v. Surinder Singh Kanda* [1961] 1 MLJ 1, Thomson CJ observed that "without prejudice to" meant "no restriction on what is being qualified".

[53] This was the evidence given by SD2 under cross-examination that was quoted by the SCJ in para. 16 of the GOJ:

H PC: Mr. Mohan based on the stakeholder's agreement the plaintiff had agreed to a stay one of the reasons because the right to post judgment interest?

SD2: You mean they reserve their right to post judgment interest?

PC: Yes.

I

SD2: Yes they did.

[54] Therefore, there was simply no contractual agreement that the respondents are entitled to the post-judgment interest. The said clause simply means that both parties are reserving their rights on the issue of post-judgment interest. The SCJ did not accept the appellant's contention that the said clause was inserted as there was clarification on the issue of the draft order, as the SCJ took the position that there was no clarification that was pending in the COA when the consent order was entered on 29 September 2010 (see para. 17 GOJ).

[55] However, we agree with the appellant that parties were only preserving their respective positions, *vis-a-vis* their differences on the issue of post-judgment interest. This is because parties were already at odd and cannot agree on the terms of the draft COA order dated 2 September 2010, in relation to the issue of interest. The respondents' draft order was objected to by the appellant *vide* their letter dated 20 September 2010. The appellant then amended the draft order and returned the same to the respondents. Therefore, even though there was no clarification pending on the draft order at the time the stakeholder or consent agreement was executed, parties were already having their differences on the issue of interest in the draft order.

[56] In the premise, we find that both the stakeholder agreement and the consent agreement merely preserved the parties' respective positions, *vis-a-vis* their differences on the issue of post-judgment interest. There is nothing in either agreement that provides for the respondents the right to post-judgment interest. There is nothing in either agreement that the appellant had actually agreed that the respondents were entitled to post-judgment interest. As such, there is no contractual basis for the respondents to claim for the post-judgment interest. We therefore find that both the SCJ and the learned JC have erred in their findings on the contractual basis of this claim.

Conclusion

[57] In light of the foregoing reasons, we do not find it necessary to deal with the issue of *res judicata*. It is pertinent for us to go back to the pleaded cause of action of the respondents in order to ascertain if the respondents have a valid cause of action premised on O. 42 r. 12 RHC 1980, and/or r. 16 of the COA Rules and under the consent agreement. In view of our finding that the respondents have failed to establish a valid cause of action under O. 42 r. 12 RHC 1980, and/or r. 16 of the COA Rules and under the consent agreement, we therefore find that the SCJ has erred in her finding, and since this error was affirmed by the learned JC, this justifies our appellate intervention. Consequentially, the respondents' case must be dismissed. In the premise, the appeal is allowed with cost.